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No. 87-1123

In the Supreme Court of the United States

OCTOBER TERM, 1987

CAROL TUTTLE CHRISTIAN, RUSSELL TUTTLE, GEORGE STETSON, GEORGE T. MASCOTT, MARY SEYMOUR, G. THEODORE MASCOTT, JR., ESTATE OF ROBERT CLEAVES, PATRICIA GOULD ANGLIN, AGNES CONWELL QUINLAN, WILLIAM J. DEVINE, ZELWYN A. AARONS, BENJAMIN N. PAGE, VIRGINIA P. HART AND MELBA W. NORVELL,

APPELLANTS,

v.

E. GARRETT BEWKES,

APPELLEE.

On Appeal From the Supreme Judicial Court of Massachusetts

APPELLEE'S MOTION TO DISMISS

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APPELLANTS,

v.

E. GARRETT BEWKES,

APPELLEE.

On Appeal From the Supreme Judicial Court of Massachusetts

MOTION TO DISMISS

The appellee, E. Garrett Bewkes, hereby moves that this Court enter an order dismissing the instant appeal. As grounds therefor, the appellee states that this Court is without jurisdiction over this matter, because the appellants did not raise before the Massachusetts courts the Constitutional issue which they now seek to present. The Supreme Judicial Court of Massachusetts determined the case exclusively on the basis of the application of state law to the claims pleaded by the plaintiffs. No question of conflict between the land registration statute and the Due Process Clause of the Fourteenth Amendment was considered or decided. In further support hereof, the appellee offers the following facts, points and authorities.

Statement of Relevant Procedural Facts

In their jurisdictional statement, the appellants accuse the Supreme Judicial Court of Massachusetts of "indulging in the transparent fiction that plaintiffs/appellants had never raised the issue of due process" in the state court proceedings. (J.S. 10).[1] Review of the pleadings and briefs filed previously in this matter establishes clearly, however, that the appellants' accusation is unfounded. It is unassailably apparent upon the record in this case that the appellants conjured up their belated attack upon the statute which accords finality to registration decrees only after they failed to establish their right to relief under either that statute or the other theories pleaded in their complaint.

The appellants claim to be the successors in interest of persons who, in the mid-1870's, bought lots of land in a Nantucket subdivision which never came into being.[2] The isolated land has never been occupied or used by anyone. Prior to the disputed tax takings, sales and court proceedings, it does not appear that anyone expressed any interest in the land. In 1963, when the property was taken for nonpayment of taxes, no official records existed within Nantucket County, either in the Registry of Deeds, or in the Registry of Probate, from which it could be determined who, if anyone, claimed to be the present owner, by inheritance or otherwise, of the property.

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[1] References to the Jurisdictional Statement filed by the appellants are cited as (J.S. __). References to documents in the Appendix to the Jurisdictional Statement are cited as (J.S.A. __). References to the appendix included herein are cited as (A. __).

[2] It is noteworthy that, although the appellants appear in this court as a group, there is no identity or unity between the ownership rights which they respectively claim. Indeed, appellants Quinlan and Norvell are the only persons among the group who were successful in convincing the Land Court that they, in fact, would enjoy interests in the locus were it not for the intervention of the tax taking, foreclosure, and registration proceedings. (J.S.A. 43-44, 54-55). All of the remaining plaintiffs were held, for various reasons, to lack standing to make any claims to ownership of the premises. (*Id.*).

The locus was taken for nonpayment of taxes in 1963 and, four years later, the Land Court foreclosed the rights of any and all persons claiming to be the owners to redeem the land by payment of past due taxes. The registration proceedings commenced in 1968, but it was not until 13 years later, after Mr. Bewkes had purchased the property for value, that title was confirmed.

While proceedings which eventually led to registration were ongoing, appellant Devine, who makes a business of seeking out potentially troubled titles and instituting litigation to gain possession of land, became interested in the parcel which Mr. Bewkes had purchased. (J.S.A. 38). In July of 1981, five months before the decree of registration entered, Devine had already entered into agreement with Quinlan, had a deed purportedly giving him one half of Quinlan's purported interest, and had signed an agreement giving him total control over litigation which was to be used to promote the joint venture of recovering the Quinlan interest, and developing the land thereafter. (J.S.A. 38-39). Before the decree entered, Devine had enlisted in the scheme seven of the original plaintiffs, and was entitled to name them as plaintiffs in litigation which he would control.

Devine knew that the registration case was proceeding to judgment. He chose, however, to make no attempt to appear or intervene in the registration proceedings, and allowed a final decree to enter, and the period for appeal to pass, without making his claims or the claims of his co-venturers known to the Land Court.

Whatever their reasons, the appellants allowed the decree to enter, and the appeal period to run, and then instituted a collateral attack upon Bewkes' confirmed title in the Superior Court of Massachusetts. Neither the original complaint nor the amended and second amended complaints by which it was followed set forth any challenge to the constitutionality of the registration statutes, on any grounds. See A. 3-15.

There is not a single reference, in any of the three versions of the complaint, to the United States Constitution, the Massachusetts Constitution, due process of law, or the invalidity of General Laws Chapter 185 §45. Although Massachusetts courts are vested with the authority to declare the validity of statutes, no claim for such relief was ever presented. See G.L. c. 231A. The appellants never complied with the provisions of Rule 24(d) of the Massachusetts Rules of Civil Procedure which requires any party who seeks the declaration of the invalidity of a statute to give notice to the Attorney General in sufficient time as to allow the Commonwealth the opportunity to intervene in the action in order to protect its own interests.

The Second Amended Complaint upon which the trial proceeded contained four counts, two of which were premised on the allegation that Bewkes was chargeable with both the purported fraud of his predecessors in interest and the supposed wrongdoing of Robert Mooney, an attorney with whom he had no relationship. There was a count for the imposition upon Bewkes of a constructive trust, which would have left the registration decree intact. (A. 8-12). Two counts sought money damages from Mooney. (A. 12-13). The final count sought relief under the provisions of G.L. c. 185 §45 which allow relief from judgment where a registrant has worked a fraud upon the Land Court. (A. 13). The constitutionality of that statute was not challenged, even inferentially.

It was upon these pleadings, and the theories asserted therein, that the case was tried. At no time have the appellants sought leave to amend their complaint to set forth a specific claim that the registration statute is unconstitutional.[3] Nor can it

[3] It is noteworthy that the plaintiffs *did* move to amend their complaint during trial, but the amendment was entirely unrelated to the issue which they now seek to present. Realizing that they were not going to be able to prove any basis for recovery against Mooney on a fraud theory, they sought to amend their complaint so as to set forth a claim for negligence. (J.S.A. 16).

be said that the issue was tried by consent of the parties. The trial judge certainly did not perceive that any constitutional claim was raised by the pleadings or trial, as evidenced by the absence of any discussion of a constitutional issue in a 44-page opinion setting forth his findings and rulings. (J.S.A. 14-55).

On appeal to the Supreme Judicial Court (the "SJC"), the appellants fared no better with their belatedly-raised due process challenge. The SJC stated explicitly in its opinion that the plaintiffs had not challenged, on due process grounds, the absence of notice to them of the registration proceeding. (J.S.A. 10, n.11). The SJC affirmed the judgment in favor of Bewkes exclusively on the basis of the appellants' failure to prove their right to recovery under the fraud theories which they had properly advanced. (J.S.A. 11).

Argument

I. THIS COURT IS WITHOUT JURISDICTION OVER THE INSTANT APPEAL, BECAUSE THE APPELLANTS FAILED TO TIMELY RAISE BEFORE THE MASSACHUSETTS COURTS THE ISSUE OF THE CONSTITUTIONALITY OF THE MASSACHUSETTS LAND REGISTRATION SYSTEM WHICH PROVIDES ABSOLUTE FINALITY TO A DECREE OF REGISTRATION ISSUED BY THE LAND COURT.

A. *The Jurisdictional Prerequisites*

The appellants claim that this Court has jurisdiction over the instant appeal pursuant to the provisions of 28 U.S.C. §1257(2), governing direct appeals from the courts of the states. In relevant part, the statute provides:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> (2) by appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity."

The plain language of the statute indicates that there are two requirements which must be satisfied conjunctively in order to confer jurisdiction upon this Court. The appellant must have raised the issue of repugnancy in the state courts in accordance with the applicable procedural requirements. *Board of Directors of Rotary International* v. *Rotary Club*, 481 U.S. __, 95 L.Ed.2d 474, 487, 107 S.Ct. 1940 (1987); *Michigan* v. *Tyler*, 436 U.S. 499, 512 n.7 (1978). In addition, the appellant must demonstrate that the state courts have considered the federal question, and have made a decision in favor of the validity of the statute. 28 U.S.C. §1257(2); *cf. Durley* v. *Mayo*, 351 U.S. 277, 281 (1955), *reh. den.* 352 U.S. 859 (1956).

Determination of whether the first requirement has been satisfied necessitates a review of procedural history. The appellant is required to demonstrate that it has presented the constitutional question to the state courts, in accordance with state procedural requirements.

> It is well settled that this Court will not review a final judgment of a State unless the 'record as a whole shows either expressly or by a clear implication that the federal claim was adequately presented in the state system.' *Webb* v. *Webb*, 451 U.S. 493, 496-497.

Board of Directors of Rotary International v. *Rotary Club*, *supra*, 95 L.Ed.2d at 487.

Although no particular form of words is required to raise a federal question, this Court has made clear that appellants are expected to have raised specific challenges, based upon identified portions of the United States Constitution, in appropriate pleadings and at appropriate times in the proceedings.

> This means that the claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice.

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Atlantic Coast Line R.R. v. *Mims*, 242 U.S. 532, 535 (1917). A purported constitutional question, raised as an "afterthought" on appeal or rehearing will not be considered by this Court.

> The long-established general rule is that the attempt to raise a federal question, after judgment, upon a petition for rehearing, comes too late unless the court actually entertains the question and decides it.

Herndon v. *Georgia*, 295 U.S. 441, 443 (1935).

Determination of whether the state court has passed upon the federal question, and upheld the validity of the state statute, is determined by review of the state court opinion at issue. *Webb* v. *Webb*, 451 U.S. 493, 495 (1981). When it is unclear whether a federal question has been decided, resort will be made to the rule that it will be assumed that an omission to decide such a question was due to want of proper presentation in the state courts, at least until the aggrieved party can affirmatively show to the contrary. *Webb* v. *Webb*, 451 U.S. 493, 495 (1981); *Street* v. *New York*, 394 U.S. 576, 582 (1969).

Where the state court has determined expressly that an appellant has failed to preserve or present properly an issue of constitutional magnitude, such a determination is entitled to great deference by this Court, and will ordinarily not be reviewed.

> When, as here, there can be no pretense that the [state] court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong. *Nickel* v. *Cole*, 256 U.S. 222, 225, 65 L.Ed.2d 900, 905, 41 S.Ct. 467.

Wolfe v. *North Carolina*, 364 U.S. 177, 195 (1960).

> [U]pon the question of whether or not such a claim has been asserted, the decision of the state court is binding on this court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right. (Citations omitted)

Atlantic Coast Line R.R. v. *Mims, supra*, 242 U.S. at 535.

B. *The Claim That the Land Registration System Is Unconstitutional Was Not Timely Raised in the State Courts.*

The claim by the appellants, that they have "done everything in their power repeatedly to put their due process claims before the Massachusetts courts at every stage in these proceedings" is nothing more than wishful thinking. (J.S. 3). Although they cite their Second Amended Complaint as the first instance in which they raised their claim that the finality of the registration process violates their rights to due process, it is clear, upon examination of that document, that no such claim was encompassed therein. (A. 3-15).

Neither the allegation that they had no notice of proceedings affecting the locus nor their request that the registration be declared void can be construed as setting forth a challenge to the constitutionality of the registration statute. *Oxley Stave Co.* v. *Butler County*, 166 U.S. 648 (1897). This is particularly the case where, as here, the allegation and prayer for relief were inextricably bound in a theory of recovery based exclusively on the purported fraud and wrongdoing of named individuals.

The *Oxley Stave* case, decided under an earlier, but analogous, version of the jurisdictional statute here at issue, is precisely in point. There, as here, the plaintiffs asserted in the state court complaint that judgments operating against them were void for lack of notice and fraud upon the issuing court. On appeal to this Court from an adverse decision of the

Supreme Court of Missouri, it was held that such general allegations did not raise federal questions for decision by the state courts and that consequently jurisdiction for appeal to this Court would not lie. 166 U.S. at 660.

The plaintiffs deliberately chose to rely exclusively on the theory that Mr. Bewkes either participated in, or was chargeable with, a fraud upon the Land Court in the procurement of the registration of title to locus. Plaintiffs did not challenge the validity of G.L. c. 185 §45. On the contrary, it was pursuant to that statute that they sought to have the judgment of registration set aside. Neither their request for relief under the statute, nor their request for the imposition of a constructive trust, a common law remedy for fraud, provided the Land Court with any notice of a claim that the finality of registration decrees may be violative of rights protected by the United States Constitution.

Appellants would now like to ignore the limitations of their own pleadings, preferring to rely for jurisdictional purposes upon their oral assertion during an argument at trial that due process concerns were at issue in the case. For a variety of reasons, their reliance is obviously misplaced.

The trial judge was certainly entitled, as a matter of Massachusetts law, to ignore an argument which went beyond the scope of the pleadings, and for which a procedural predicate was otherwise lacking. *Tompkins* v. *Sullivan*, 313 Mass. 459, 461-463 (1943); *Seder* v. *Kozlowski*, 304 Mass. 367, 369-370 (1939). The Land Court was required to decline to entertain the issue where the appellants deprived the Commonwealth of the opportunity to protect its interest in upholding the statute. The courts of Massachusetts have held quite consistently that the failure to notify the Attorney General of such a challenge, in such time as to allow that officer to fully litigate the question, bars the plaintiff from relief on that ground. *Karchmar* v. *City of Worcester*, 364 Mass. 124, 135 (1973); *Gamache* v. *Acushnet*, 14 Mass. App.

Ct. 215 (1982). Not only did the appellants fail to comply with the dictates of Mass. R. Civ. P. 24(d), they actually *resisted* an attempt by Bewkes to add the Commonwealth as a party.[4] Having done so, they foreclosed completely any opportunity for appropriate litigation of the issue which they later sought to raise.

Moreover, it is clear that the due process issue about which appellants' counsel spoke at trial and wrote in trial briefs was a different issue than that which they now press upon this Court. In their pre-trial brief, appellants claimed that the defendants deprived them of due process of law by failing to cause the issuance to them of a notice of the tax lien foreclosure case. (J.S.A. 78-79). In their post-trial brief, their focus changed, and they argued that Bewkes was not entitled to any protection by way of the registration decree because he failed to comply with G.L. c. 185 §39, which requires the issuance of a notice to persons claiming interests in a locus to be registered. (J.S.A. 80-81). The portion of this brief which is reproduced in the appendix to the Jurisdictional Statement does not even mention the Constitution.

The other reference upon which the appellants rely, an oral argument during the trial in the course of which the Constitution was mentioned, can hardly be read as a statement of the issue which is here presented. (J.S.A. 76-77). The complaint of appellants' counsel about the adequacy of a notice "published in January or February down in Nantucket" (J.S.A. 77) was obviously directed at the notice of the tax lien foreclosure case which appeared in the *Nantucket Inquirer and Mirror* on February 2, 1967. His reference to "*Hardy* v. *Jaeckle*" (J.S.A. 77) was likewise directed specifically to tax taking procedures which are the subject of that case and not to the registration statutes. See *Hardy* v. *Jaeckle*, 371 Mass. 573 (1976).

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[4] Bewkes moved to join the Commonwealth as a party, on the basis, *inter alia*, that the outcome of the case would affect a privilege granted by the state, indefeasible registration. The Commonwealth supported the motion, but the appellants opposed the joinder. (A. 16-21).

The focus of the argument then advanced was clearly upon the adequacy of tax taking procedures. No amount of creative editing can transform these arguments into the sweeping attack upon the finality of registration procedures which the appellants now seek to present to this Court.

The appellants also claim that they raised before the Supreme Judicial Court the question set forth in the Jurisdictional Statement. In support of this assertion, they cite passages from the summary statements of issues which were included in briefs filed in the Supreme Judicial Court. (J.S.A. 76-84). Notably, the relevant text of these briefs is not contained within the appendix.

This aspect of their argument reflects, once again, wishful thinking. Reference to the text of the briefs before the Supreme Judicial Court demonstrates aptly that the due process issue there presented was markedly different from that which is now urged before this Court. Moreover, the content of the briefs before the SJC is simply irrelevant where, as here, controlling state law foreclosed reliance at the appellate level upon arguments and grounds not advanced previously.

Relevant sections of the appellants' Brief and Reply Brief have been reproduced in full in the appendix hereto. (A. 22-34). The following passages establish that, in the SJC, the appellants were preoccupied with questions concerning takings and foreclosures, and that the adequacy of due process protection in registration proceedings was not even mentioned:

> 2. *The Absence of Constitutional Required Notice Deprived Plaintiffs of Due Process of Law.*
>
> "Even if the purported taking of plaintiffs' property were not in violation of Massachusetts statutes and controlling judicial decisions it is plain that the assessment, taking and the Tax Foreclosure Action deprived plaintiffs of property without the due process of law guaranteed by the United States Constitution." (A. 24).

> "The requirements of federal due process thus parallel the existing law of the Commonwealth regarding the validity of tax takings. Improper assessments, lack of notice and failure to comply with the provisions of the tax taking statutes *'strictissimi juris'* all render a tax foreclosure invalid and a nullity." (A. 26).
>
> "Because the notice here did not comply with the constitutional requirements of reasonable effort, even under the relaxed standards of *Hardy* v. *Jaeckle*, it was constitutionally defective and the bar of Section 69A does not apply." (A. 27).[5]

It is worthy of note that there was ample motivation for the appellants to deliberately avoid focusing upon a due process challenge to the registration decree itself. Eight of the appellants, including Mr. Devine, who unilaterally controlled and financed the litigation, were necessarily to be confronted with the fact that they knew, or were charged with knowledge, of the registration case and had chosen deliberately not to enter that action to protect their asserted interests. (J.S.A. 38-39).

Devine, who organized and financed the litigation effort, knew both of the registration case and of the nucleus of facts giving rise to his challenge to the registration more than a year before the judgment of registration entered. Five months before title was registered, he possessed a deed to one-half of appellant Quinlan's claimed interests, and thus had standing to move to intervene. (J.S.A. 39). Seven other appellants also had joined the venture before the registration was decreed. (J.S.A. 39) All of these appellants had the opportunity to litigate title and notice issues within the registration case, and on appeal, if necessary, but chose not to do so. By their

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[5] The references to "*Hardy* v. *Jaeckle*" and to "Section 69A" relate to a case and a statute concerned exclusively with tax taking foreclosures, the statutory reference being directed to a provision which accords finality to foreclosures after the passage of a one-year period. See G.L. c. 60 §69A.

deliberate strategic choices appellants made themselves subject to the limitation upon collateral attack which they now seek to challenge.

The validity of the limitation on collateral attack set forth in G.L. c. 185 §45 was never challenged on due process grounds because Devine had good reason to be doubtful of the likelihood of success of such a challenge, and he controlled the litigation. Only when a deliberately chosen strategy proved to be fatally flawed did the appellants lash out in frustration at the entire system of registration, the Land Court, its judges, and the Bar of the Commonwealth. From this genesis was born the assertion that G.L. c. 185 §45 cannot constitutionally afford finality to registration decrees. The argument was first presented to the SJC in a request for rehearing, filed after that court's opinion was released.[6] Such is not the stuff of which appeals to this Court are made. See *Herndon* v. *Georgia*, *supra*, 295 U.S. at 443.

C. *The Supreme Judicial Court Was Not Required To Consider, and Did Not Consider, the Issue Which the Appellants Now Press Upon This Court.*

This Court need not concern itself unduly, however, with the determination of the magnitude of the difference between what the appellants argued in the Supreme Judicial Court and what they now seek to argue. The content of briefs submitted to the state courts is immaterial if the presentation of the issues set forth in the briefs was foreclosed by failure to comply with applicable procedural requirements. *Michigan* v. *Tyler*, *supra*, 436 U.S. at 512 n.7; *Wolfe* v. *North Carolina*, 364 U.S. 177, 195 (1960).

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[6] Curiously, the appellants did not, in their Jurisdictional Statement, describe this request as a stage in the proceeding at which the issue was raised and the document does not appear in the appendix thereto. See Supreme Court Rule 21(h).

Massachusetts does not afford to litigants the opportunity for plenary review in appellate courts of arguments not within the scope of the pleadings. *Lapointe* v. *Licensing Board of Worcester*, 389 Mass. 454, 457 (1983). The failure to present an issue to the trial court for determination is fatal to an attempt to raise the issue on appeal. This rule is applicable to claims based upon the Constitution. As the Supreme Judicial Court noted in *Axelrod* v. *Board of Assessors of Boxborough*, 392 Mass. 460, 463 n.2 (1984), a claim that a trial court's interpretation of a statute is unconstitutional is of no avail to a litigant if the construction is correct, and the constitutional issue has not been raised at trial.

Massachusetts appellate courts will not entertain on appeal a theory of recovery different from the theory urged below. *Pattelena* v. *Segel*, 346 Mass. 726, 730 (1964); *Marcil* v. *John Deere Industrial Equipment Co.*, 9 Mass. App. Ct. 625, 629 (1980). Moreover, inexcusable delay in the presentation of an issue of constitutional magnitude, which delay results in the failure or inability of the Commonwealth to intervene to protect its interests, has been held to bar consideration of the issue. *Karchmar* v. *City of Worcester*, 364 Mass. 124, 135 (1973). The SJC was not bound, nor did it choose, to entertain a constitutional argument neither encompassed by the pleadings nor raised before the trial court.

In its opinion, in the context of a discussion of the finality of a judgment of registration, the Supreme Judicial Court stated specifically that "the plaintiffs do not challenge on due process grounds the absence of notice to them of the registration proceeding". For obvious reasons, the plaintiffs choose simply to dismiss this determination, patronizingly stating that the Supreme Judicial Court is "to put it most charitably, incorrect" and accusing the Supreme Judicial Court of "indulging in [a] transparent fiction." (J.S. 2, 10).

The appellants, not the SJC, indulge in fiction, and disserve their cause by such cavalier treatment of an appellate deter-

mination which, according to the holdings of this Court, is entitled to great deference. See *Wolfe* v. *North Carolina*, *supra*, 364 U.S. at 195; *Herndon* v. *Georgia*, *supra*, 295 U.S. at 443.

For any number of legitimate reasons, the Supreme Judicial Court was entitled to conclude that no due process issue arising out of the registration had been preserved or presented. See generally *Orr* v. *Orr*, 440 U.S. 268, 274-277 (1979). The issue was not pleaded, it was not tried, and the Land Court had made no findings or conclusions relative thereto. The Attorney General of the Commonwealth had not been notified of the appellants' intent to raise such a challenge. The Land Court judge had made no finding or rulings thereon, even though he had painstakingly resolved in his lengthy opinion the myriad of issues which were properly raised in the case. As this Court stated in *Michigan* v. *Tyler*, *supra*, 436 U.S. at 512 n.7:

> Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule. (Citations omitted).

The factors noted above are not insignificant in determining whether appellate review was, and is, appropriate. The Land Court had received no evidence directed toward due process concerns, and neither that court nor the Supreme Judicial Court had any record upon which to base a balancing of state and municipal interests in the certainty of titles and the efficiency of tax collection procedures against the dormant individual interests in long-forgotten land. There is no evidence in the record relative to the vital question of whether any reasonable effort to give notice, if undertaken, would have changed the result in this case. Assuming that the SJC could perceive from the record that the appellants sought to challenge the rule of finality, it could hardly be expected to determine, in a vacuum, whether that rule is indispensable to the operation of a workable system of registration.

A question of such magnitude, the determination of which could affect the marketability of an incalculable number of registered titles, is not one which should be litigated only by a private party such as Bewkes. The Commonwealth's interests had not been represented in the litigation, and the Supreme Judicial Court had good reason to decline to entertain any challenge to the registration statute in this context if it perceived that such a challenge was presented.

Of course, as the foregoing argument demonstrates, good reason existed for the Supreme Judicial Court to conclude that no such challenge was made. The appellants now suggest that they "led the Supreme Judicial Court astray" by their own focus upon the statute erecting a one-year period of limitations for challenges to tax lien foreclosures. (J.S. at 2, n.5). The Supreme Judicial Court included in its opinion a discussion of the appellants' due process concerns relating to takings and foreclosures, but decided the case on adequate and independent state statutory grounds entirely separate from and unrelated to those concerns. (J.S.A. 10-11). The Supreme Judicial Court was not "led astray" at all. The court addressed the arguments which were presented properly, decided the case on the basis of the application of state law to the theories pleaded and facts proven, and wisely declined to engage itself in the consideration of issues which were not squarely in focus.

Conclusion

It is clear upon the record of prior proceedings that the appellants have never raised before the courts of Massachusetts the specific constitutional challenge which they now attempt to present. This case was tried and determined by the Land Court on the basis of the issues joined in the pleadings filed by the parties. The appellants' belated attempts to raise due process issues before the appellate courts of Massachusetts cannot serve as a basis for this Court's jurisdiction. The issues tried and raised on appeal were entirely distinct from the issue here presented, ant the Supreme Judicial Court refused, for good reason, to address any constitutional issue. Based upon the foregoing points and authorities, the appellee requests that this Court enter an order dismissing the instant appeal.

Respectfully submitted,

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APPENDIX

Massachusetts Rules of Civil Procedure

RULE 24. INTERVENTION

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the Commonwealth confers an unconditional right to intervene or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the Commonwealth confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

(d) Intervention by the Attorney General. When the constitutionality of an act of the legislature or the constitutionality or validity of an ordinance of any city or the by-law of any town is drawn in question in any action to which the Commonwealth or an officer, agency, or employee thereof is not a party, the party asserting the unconstitutionality of the act or the unconstitutionality or invalidity of the ordinance or by-law shall notify the attorney general within sufficient time to afford him an opportunity to intervene.

* * *

Massachusetts General Laws

c. 231A, § 8. Necessary parties; class actions

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or by-law or of a franchise, license, easement or other privilege granted by the commonwealth or a municipality thereof, the municipality, or the agency granting the privilege, as the case may be, shall be made a party and shall be entitled to be heard. If a question of constitutionality is involved in any proceeding under this chapter, the attorney general shall also be notified of the proceeding and be entitled to be heard.

Nothing set forth in this section shall bar the bringing of a class action for declaratory relief pursuant to the new rules of civil procedure.

Following entry of a final decree or order favorable to the petitioner or petitioners in a class suit, any member of said class thereafter aggrieved by any violation of said order or decree shall be entitled to compel compliance therewith by instituting contempt proceedings in said class suit.

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

SUFFOLK, ss.

No. 106538

CAROL TUTTLE CHRISTIAN, RUSSELL TUTTLE, RUTH DIETRICH TUTTLE, DOROTHY STETSON, GEORGE T. MASCOTT, MARY SEYMOUR, FLORENCE ANDERSON, ROBERT CLEAVES, JR., EDGAR D. GOULD, JR., AGNES CONWELL QUINLAN, WILLIAM J. DEVINE, ZELWYN A. AARONS, BENJAMIN N. PAGE, VIRGINIA P. HART, MELBA W. NORVELL, AND LESTER B. WOODBURY

PLAINTIFFS

v.

ROBERT F. MOONEY

DEFENDANT

and

E. GARRETT BEWKES

DEFENDANT AND THIRD-PARTY PLAINTIFF

v.

WALTER BEINECKE, JR.

THIRD-PARTY DEFENDANT

SECOND AMENDED COMPLAINT

NATURE OF ACTION

1. By this action, the plaintiffs, Carol Tuttle Christian, Russell Tuttle, Ruth Dietrich Tuttle, Dorothy Stetson, George T. Mascott, Mary Seymour, Florence Anderson, Robert Cleaves, Jr., Edgar D. Gould, Jr., Agnes Conwell Quinlan, William J. Devine, Zelwyn A. Aarons, Benjamin N. Page, Virginia P. Hart, Melba W. Norvell, and Lester B. Woodbury

(collectively, "plaintiffs") seek a declaratory judgment that the defendant E. Garrett Bewkes ("Bewkes") holds certain property in a constructive trust in the right and for the benefit of the plaintiffs, and an order that Bewkes convey that property to the plaintiffs. In addition, plaintiffs seek to recover damages from the defendant Robert F. Mooney ("Mooney") for fraud and breach of fiduciary duty in examining title to the plaintiffs' property and in falsely reporting that title to the Land Court. The plaintiffs also seek review of the decree of the Land Court of December 9, 1981 registering title to certain property to the defendant Bewkes.

PARTIES, JURISDICTION AND VENUE

2. The plaintiff Carol Tuttle Christian ("Christian") is a resident of Shottermill, Haselmere, Surrey, England and is a co-owner of an undivided interest in and to a certain parcel of land on Nantucket Island, shown as Lots 355 through 370 on a plan entitled "Plan of House Lots for Sale by Winchester Veazie," Share 10, Smooth Hummocks, recorded in Proprietors' Plans, Book 1, Page 94 (the "Plan").

3. The Plaintiff Russell Tuttle ("Tuttle") is a resident of Landsdowne, Delaware County, Pennsylvania and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 355 through 370 on the Plan.

4. The plaintiff Ruth Dietrich Tuttle ("Dietrich Tuttle") is a resident of Concord, Middlesex County, Massachusets and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 355 through 370 on the Plan.

5. The plaintiff Dorothy Stetson ("Stetson") is a resident of Chestnut Hill, Norfolk County, Massachusetts and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 126 through 250 on the Plan.

6. The plaintiff George T. Mascott ("Mascott") is a resident of St. Petersburg, Penelis County, Florida and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 126 through 250 on the Plan.

7. The plaintiff Mary Seymour ("Seymour") is a resident of Ghent, Columbia County, New York, and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 126 through 250 on the Plan.

8. The plaintiff Florence Anderson ("Anderson") is a resident of New York, New York County, New York and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 126 through 250 on the Plan.

9. The plaintiff Robert Cleaves, Jr. ("Cleaves") is a resident of Chestnut Hill, Norfolk County, Massachusetts and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 126 through 250 on the Plan.

10. The plaintiff Edgar D. Gould, Jr. ("Gould") is a resident of Fort Lauderdale, Broward County, Florida and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 126 through 250 on the Plan.

11. The plaintiff Agnes Conwell Quinlan ("Quinlan") is a resident of Arlington, Virginia and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 355 through 370 on the Plan.

12. The plaintiff William J. Devine ("Devine") has an usual place of business at 11 Beacon Street, Boston, Suffolk County, Massachusetts and is a co-owner of an undivided interest in and to certain parcels of land shown as Lots 126 through 250; 272 through 273; 294 through 306; 309 through 324; and 355 through 370 on the Plan.

13. The plaintiff Zelwyn A. Aarons ("Aarons") is a resident of Carmel, Monterey County, California and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 126 through 250 on the Plan.

14. The plaintiff Benjamin N. Page ("Page") is a resident of Dover, New Hampshire and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 294 through 300 and 306 on the Plan.

15. The plaintiff Virginia P. Hart ("Hart") is a resident of Shawnee Mission, Kansas and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 294 through 300 and 306 on the Plan.

16. The plaintiff Melba W. Norvell ("Norvell") is a resident of Fallbrook, California and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 272; 273; 301 through 305; and 309 through 324 on the Plan.

17. The plaintiff Lester B. Woodbury ("Woodbury") is a resident of Springfield, Massachusetts and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 272; 273; 301 through 305; and 309 through 324 on the Plan.

18. The defendant E. Garrett Bewkes, upon information and belief, has an usual place of business at 22 Federal Street, Nantucket, Nantucket County, Massachusetts.

19. The defendant Robert F. Mooney, upon information and belief, has an usual place of business at 22 Federal Street, Nantucket County, Massachusetts.

PLAINTIFFS' CLAIMS

I. Background

20. In 1874, one Winchester Veazie ("Veazie") acquired a certain parcel of land on Nantucket Island known as Share 10 of Smooth Hummocks, consisting of approximately 47.54 acres of land (the "locus"). Also in 1874, Veazie subdivided the locus into 380 lots and conveyed 361 of the 380 lots to D. Morton Fox ("Fox") and five single lots to five other individuals.

21. Thereafter, Fox conveyed all but one of his 361 lots to eight individuals, including lots 126 through 250 to Ellen (a/k/a "Ella") F. Gould, lots 270 through 324 to Andre Woodbury, and lots 355 through 270 to Russell H. Conwell. Ella F. Gould is the grandmother and/or predecessor in interest of plaintiffs Stetson, Mascott, Seymour, Anderson, Cleaves,

Gould, Devine, and Aarons. Andre Woodbury is the grandfather and/or predecessor in interest of the plaintiffs Norvell, Woodbury and Devine. Russell H. Conwell is the grandfather and/or predecessor in interest of the plaintiffs Quinlan, Russell Tuttle, Ruth Dietrich Tuttle and Devine.

22. Andre Woodbury conveyed lots 270, 271, 274 through 300 and lot 306 to Rufus A. Johnson. Rufus A. Johnson was the grandfather and/or predecessor in interest of the plaintiffs Page, Hart, and Devine.

23. Christian acquired her interest as an heir at law to her father, Melsom Tuttle, and her grandmother, Nima Conwell who was the daughter of Russell H. Conwell.

24. Tuttle acquired his interest as an heir at law to his father, Melsom Tuttle, and his grandmother Nima H. Conwell, who was the daughter of Russell H. Conwell.

25. Dietrich Tuttle acquired her interest as an heir at law to her husband, Melsom Tuttle, the son of Nima H. Conwell, who was the daughter of Russell H. Conwell.

26. Stetson acquired her interest as an heir at law of her mother, Josephine L. Cleaves (formerly Josephine L. Gould), who was the daughter of Amos D. Gould and Ella F. Gould.

27. Mascott acquired his interest as residual legatee of his wife Edith Mascott, who was the daughter of E. Florence Anderson (formerly E. Florence Gould) who was the daughter of Amos D. Gould and Ella F. Gould.

28. Seymour acquired her interest as an heir at law to her mother E. Florence Anderson (formerly E. Florence Gould), who was the daughter of Amos D. Gould and Ella F. Gould.

29. Anderson acquired her interest as an heir at law to her mother, E. Florence Anderson (formerly E. Florence Gould), who was the daughter of Amos D. Gould and Ella F. Gould.

30. Cleaves acquired his interest as heir at law to his mother, Josephine L. Cleaves (formerly Josephine L. Gould) who was the daughter of Amos D. Gould and Ella F. Gould.

31. Gould acquired his interest as an heir at law to his father, Edgar Gould, who was the son of Amos D. Gould and Ella F. Gould.

32. Quinlan acquired her interest as residual legatee under the will of her mother, Harriet B. Conwell, the son of Russell H. Conwell.

33. Devine acquired his interest by virtue of deeds from the other plaintiffs to themselves and Devine.

34. Aarons acquired his interest as residual legatee of his wife, Anna Aarons, who was the residual legatee of her mother, Mable M. Stallwagon, who was the daughter of Amos D. Gould and Ella F. Gould.

35. Page acquired his interest as an heir at law to his mother Louise Page, who was the daughter of Rufus A. and Ellen M. Johnson.

36. Hart acquired her interest as an heir at law to her mother, Louise Page, who was the daughter of Rufus A. and Ellen M. Johnson.

37. Norvell acquired her interest as a residual legatee of her father, Clarence G. Woodbury, who was the devisee under the will of Matilda F. Woodbury. Matilda F. Woodbury was the sole devisee under the will of her husband, Andre Woodbury.

38. Woodbury acquired his interest as an heir at law to his mother, Agnes H. Woodbury, who was a devisee under the will of Matilda F. Woodbury. Matilda F. Woodbury was the sole devisee under the will of her husband, Andre Woodbury.

COUNT I

39. Prior to 1963, the locus was not assessed for real estate tax purposes. In 1963, one of the tax assessors of the Town of Nantucket, John J. Gardner ("Gardner"), assessed the locus at a value of ten ($10.00) dollars, thereby imposing a tax in the amount of fifty-four ($.54) cents. The owner of the property was initially identified as "John Doe and others," but was subsequently changed by Gardner from "John Doe and others" to "Winchester Vezie [sic] of Nantucket." In fact, Veazie was a resident of Boston and deceased.

40. The assesment of the tax by Gardner to "Winchester Vezie [sic]" failed to comply with the requisites of G.L. c. 60, in that:

1. Veazie, or his heirs, owned but fourteen of the 380 lots assessed by Gardner;
2. No notice of the tax assessment was given by Gardner to the record owners of the 366 lots not owned by Veazie or his heirs;
3. The property assessed by Gardner was described as consisting of thirty acres, when in fact Veazie or his heirs were the record owners of but approximately 56,000 square feet of the locus, and the entire locus was approximately 46.54 acres.

41. The locus was taken by the Town of Nantucket on February 24, 1964 for non-payment of taxes, and, on March 27, 1964, the tax title was assigned to Gardner. The only notice of the assignment of the tax title was given to "Winchester Vezie" [sic].

42. On May 11, 1966, Gardner, through his attorney Roy E. Sanguinetti ("Sanguinetti") (who was also the Town Counsel and Town Moderator of the Town of Nantucket), filed a petition in the Land Court seeking to foreclose the equity of redemption in the locus (Land Court No. 43095). The only notice of the petition to foreclose the equity of redemption was given to Winchester Vezie [sic] and the petition stated that Veazie was the sole owner of the locus.

43. Gardner and Sanguinetti requested Mooney, a Nantucket attorney, to act as title examiner in connection with the petition to foreclose the equity of redemption and the Land Court granted the request. Mooney filed a title examination report with the Land Court on June 30, 1966, stating that Veazie, of Nantucket, was the record owner of the locus.

44. On or about April 4, 1967, the Land Court granted Gardner's petition to foreclose the equity of redemption.

45. Thereafter, on or about May 10, 1967, Gardner purported to convey the locus to Sanguinetti, as Trustee of Windswept Realty Trust, for less than $100.00.

46. On May 31, 1967, for consideration of $16,500, Sanguinetti purported to convey the locus to Walter Beinecke, Jr. ("Beinecke"), of New York, New York.

47. On October 16, 1968, Beinecke, through his attorney, Mooney, filed a registration petition in the Land Court (No. 35851) seeking to register title in the locus (the "Registration Case").

48. The registration petition filed by Beinecke and Mooney

(a) Stated that Beinecke was the owner in fee simple of the locus;
(b) Failed to disclose any other persons having an estate or interest in the locus; and
(c) Described the property to be registered as being the entire locus.

49. No notice of the Registration Case was given to the owners of the various lots of the locus.

50. On September 8, 1981, Bewkes was substituted as the petitioner in the Registration Case.

51. Bewkes paid only five thousand ($5,000.00) dollars for the locus and executed a promissory note and a mortgage to Beinecke. The note was contingent upon, *inter alia*, the completion of Land Court registration proceedings and the expiration of the appeal period and the execution of a confirmatory deed. In the event the registration proceedings were not completed within two years, Bewkes was obligated to reconvey the property to Beinecke and the note would become void and the mortgage discharged. Upon information and belief, the total purchase price paid and to be paid by Bewkes was less than ten (10%) percent of the fair value of the locus.

52. On December 9, 1981, the Court entered a decree registering title to the locus in Bewkes.

53. The assessment and imposition of a tax upon the locus by Gardner in 1963 not only failed to comply with the requisites of G.L. c. 60, but also was effected for the purpose and with the intent of causing the Town of Nantucket to acquire the locus and convey it to Gardner.

54. The assignment of the tax title by the Town to Gardner was a conflict-of-interest proscribed by G.L. c. 286A and was in violation of G.L. c. 60, in that no notice of the intended assignment was given to the owners of the locus, including the plaintiffs.

55. The subsequent petition to foreclose the equity of redemption in the locus (No. 43095) again failed to give proper and adequate notice to the owners of the locus and contained false statements that Winchester Vezie [sic] was the sole owner. Mooney, as the court appointed title examiner, knew or should have known by reviewing the records of the Nantucket Registry of Deeds that Veazie had conveyed 366 of the 380 lots of the locus in 1874 to various grantees and that there were numerous subsequent transfers of various parcels of the locus. Upon information and belief, Mooney conspired with Gardner and Sanguinetti to perpetrate a fraud upon the Land Court and upon the owners of the various parcels of the locus, and breached his fiduciary duty to the Land Court to report title with due care and without fraud.

56. The conduct of Gardner, Sanguinetti, and Mooney as aforesaid, rendered the taking and foreclosure ineffective and invalid as to the owners of the locus other than Veazie and his heirs. Upon information and belief, Beinecke, as the grantee from Sanguinetti, knew that the taking for non-payment of taxes, the assignment of the tax title, and the foreclosure of the equity of redemption by Sanguinetti, Gardner, and Mooney, was improper and that Sanguinetti, Gardner, and Mooney were engaged in fraudulent activity before the Land Court.

57. The registration petition instituted by Beinecke and Mooney contained a false statement that Beinecke was the sole

owner of the locus and failed to disclose the identity of other persons having an interest or estate in the locus. In truth and in fact, Beinecke was not the sole owner of the locus, as the records of the Nantucket Registry of Deeds readily revealed.

58. By virtue of the pleadings in the Registration Case, Bewkes knew, or is charged with knowledge of, *inter alia*, the fact that Beinecke did not own the locus in fee simple, that the taking by the town and subsequent assignment of tax title and foreclosure were improper; and that no notice of the proceedings was ever given to the true owners of the lots into which the locus had been subdivided. Despite his knowledge, Bewkes failed and refused to amend the registration petition or to otherwise advise the Land Court of the false statements contained therein.

59. On account of the conduct of Gardner, Sanguinetti, Mooney, Beinecke, and Bewkes, including the knowing and intentional fraud upon the Land Court, whether intentional or constructive, and the failure to give notice to the true owners of the lots of the locus, including the plaintiffs, Bewkes holds lots 126 through 250; 272; 273; 294 through 306; 309 through 324; and 355 through 370 of the locus in the right and for the benefit of plaintiffs, and as trustee of a constructive trust for the benefit of plaintiffs and the other owners of the lots wrongfully included in the registered title to Bewkes.

COUNT II

60. The plaintiffs repeat and reaver each and every allegation in paragraph 1-59 herein.

61. Mooney's title examination report filed with the Land Court was false and was made by him with knowledge of its falsity or with reckless disregard for its truth or falsity. In addition, the registration petition filed by Mooney on behalf of Beinecke was also false and was made by him with knowledge of its falsity or with reckless disregard for its truth or falsity, in that the petition falsely stated that Beinecke was the sole

owner of the locus, failed to disclose other interested parties, and described the property to be registered as the entire locus.

62. As a result of Mooney's fraudulent title examination report and registration petition, the plaintiffs have sustained damages in excess of $500,000.

63. By virtue of the foregoing, Mooney is liable to the plaintiffs in the sum of $500,000, together with interest and costs.

COUNT III

64. The plaintiffs repeat and reaver each and every allegation in paragraphs 1-59 herein.

65. Mooney, as a court-appointed title examiner, owed a fiduciary duty to the court and the plaintiffs to act in good faith, with reasonable care, and without fraud in reporting title.

66. Mooney breached his fiduciary duty to the plaintiffs and the court by falsely stating that Veazie was the record owner of the locus, and by intentionally failing to disclose the interests of the plaintiffs in the locus.

67. As a result of Mooney's breach of fiduciary duty, the plaintiffs have suffered damages in excess of $500,000.

68. By virtue of the foregoing, Mooney is liable to the plaintiffs in the sum of $500,000, together with interest and costs.

COUNT IV

69. The plaintiffs repeat and reaver each and every allegation in paragraphs 1-59 herein.

70. The conduct of Bewkes and Mooney and their predecessors, as aforesaid, rendered the decree of registration to Bewkes on December 9, 1981 invalid and void.

71. Pursuant to G.L. c. 185, § 45 this court should review the propriety of the registration decree and, upon such review, declare such decree to be void and without force and effect.

RELIEF REQUESTED

WHEREFORE, the plaintiffs demand judgment as follows:

1. That the Court, pursuant to G.L. c. 231, enter the following declaration: the defendant E. Garrett Bewkes holds title to Lots 126 through 250, 272, 273, 294 through 306, 309 through 324, and 355 through 370 of a parcel of land shown on a plan entitled "Plan of House Lots for Sale by Winchester Vezie, Share 10, Smooth Hummocks," recorded in Proprietors' Plans, Book, Page 94, in a constructive trust for the plaintiffs.

2. That the Court order the defendant E. Garrett Bewkes to execute and deliver forthwith to the plaintiffs Dorothy Stetson, George T. Mascott, Mary Seymour, Florence Anderson, Robert Cleaves, Edgar D. Gould, Jr., William J. Devine, and Zelwyn A. Aarons, as tenants-in-common, a deed to Lots 126 through 250 of Share 10, Smooth Hummocks.

3. That the court order the defendant E. Garrett Bewkes to execute and deliver forthwith to the plaintiffs Carol Tuttle Christian, Russell Tuttle, Ruth Dietrich Tuttle, Agnes Conwell Quinlan, and William J. Devine, as tenants-in-common, a deed to Lots 355 through 370, Share 10, Smooth Hummocks.

4. That the Court order the defendant E. Garrett Bewkes to execute and deliver forthwith to the plaintiffs Benjamin N. Page, Virginia P. Hart, and William J. Devine, as tenants-in-common, a deed to Lots 294 through 300 and 306 of Share 10, Smooth Hummocks.

5. That the Court order the plaintiff E. Garrett Bewkes to execute and deliver forthwith to the plaintiffs Melba W. Norvell, Lester B. Woodbury, and William J. Devine, as tenants-in-common, a deed to Lots 272; 273; 301 through 305; and 309 through 324 of Share 10, Smooth Hummocks.

6. That the defendant Robert F. Mooney be ordered to pay forthwith to the plaintiffs the sum of $500,000, together with interest and costs.

7. That the court review the registration decree of December 9, 1981 and enter a declaration that such decree is void and without force and effect.

8. That the plaintiffs be awarded their costs and expenses, including attorneys' fees, incurred in maintaining this complaint.

9. That the Court grant such other and further relief as it deems meet and just.

By their attorneys,

CARL K. KING
PETER S. BROOKS
GOLDSTEIN & MANELLO
One Federal Street
Boston, MA 02110

DATED: November 23, 1982

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

SUFFOLK, SS.

No. 106538

CAROL TUTTLE CHRISTIAN, RUSSELL TUTTLE, RUTH DIETRICH TUTTLE, DOROTHY STETSON, GEORGE T. MASCOTT, MARY SEYMOUR, FLORENCE ANDERSON, ROBERT CLEAVES, JR., EDGAR D. GOULD, JR., AGNES CONWELL QUINLAN, WILLIAM J. DEVINE, ZELWYN A. AARONS, BENJAMIN N. PAGE, VIRGINIA P. HART, MELBA W. NORVELL, AND LESTER B. WOODBURY

PLAINTIFFS

v.

ROBERT F. MOONEY

DEFENDANT

and

E. GARRETT BEWKES

DEFENDANT AND THIRD-PARTY PLAINTIFF

v.

WALTER BEINECKE, JR.

THIRD-PARTY DEFENDANT

MOTION TO JOIN PARTY

Defendant and third party plaintiff, E. Garret Bewkes, moves the Court to join the Commonwealth of Massachusetts as a necessary party in the instant action and states as reasons therefor:

i) that complete relief cannot be afforded the moving party unless the Commonwealth is a party as moving party will have rights against the Commonwealth under the provi-

sions of c. 185 §99-109 (the assurance fund) if plaintiff's prayers as set forth in the Second Amended Complaint are allowed; and further,

ii) that in accordance with the provisions of c. 231A, §8 all persons shall be made parties to an action for declaratory relief who have any interest which would be affected by the declaration. The instant proceeding involves a privilege granted by the Commonwealth (i.e. decree of registration) and without the Commonwealth being a party to this proceeding plaintiffs' requested relief as set forth in the Second Amended Complaint cannot be granted.

E. Garrett Bewkes

By His Attorney

s/ THEODORE L. TILLOTSON

THEODORE L. TILLOTSON
SHERBURNE, POWERS & NEEDHAM
One Beacon Street
Boston, MA 02108
(617) 523-2700

December 12, 1984

EXCERPTS: DOCKET ENTRIES

106538 - EQUITY

AGNES CONWELL QUINLAN, ET AL *v.* E. GARRETT BEWKES, JR.

Dec. 12, 1984	Motion to Join Party, filed
Dec. 12, 1984	Motion to Extend Time for Discovery, filed
Dec. 14, 1984	Defendant Robert F. Mooney's Motion to Further Amend his Answer, filed
Dec. 14, 1984	Affidavit of Notice of Motion, filed
Dec. 14, 1984	Notice of Taking Deposition, filed
Dec. 21, 1984	Motion to Amend Defendant Robert F. Mooney's Answer filed 11/2/84 — Motion Waived (Keady, J.)
Dec. 21, 1984	Defendants' Motion to Amend Answer to Plaintiff's Second Amended Complaint, filed 11/1/84 — Motion Allowed
Dec. 21, 1984	Defendant Robert F. Mooney's Motion to Further Amend his Answer filed 12/14/84 — Motion Allowed
Dec. 21, 1984	Defendants' Motion to Extend Time for Discovery, filed 12/12/84 — Motion Allowed as Modified to January 18, 1985
Dec. 26, 1984	Commonwealth's Brief in Support of Motion to Join Commonwealth, filed
Dec. 27, 1984	Defendants' Memorandum in Support of Motion to Join the Commonwealth as party, filed
Dec. 28, 1984	Plaintiffs' Memorandum in Opposition to Motion to Join Party, filed
Jan. 2, 1985	Supplementary Order Entered (By the Court, Keady, J.)
Jan. 10, 1985	Motion to Join Party, filed 12/12/84 — Motion denied (Keady, J.)
Jan. 10, 1985	Memorandum of Decision on Defendants' Motion to Join a Party, entered

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

SUFFOLK, ss.

No. 106538

CAROL TUTTLE CHRISTIAN, ET AL.

v.

E. GARRETT BEWKES, ET AL.

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION TO JOIN A PARTY

Defendant Bewkes has moved to join the Commonwealth as a necessary party, by a motion dated December 12, 1984. For the reasons outlined below, this motion is denied.

Defendant contends that he cannot be afforded complete relief unless the Commonwealth is joined, in that he will have rights against the Assurance Fund, pursuant to G.L. c. 185 § 101, should plaintiffs prevail. This contention is grounded on Mass. R. Civ. P. 19(a)(1).

Defendant's claim must fail for two reasons. First, the Commonwealth's absence from this proceeding will not prevent the court from "adjudicat[ing] finally all issues between current parties." J. W. Smith and H. B. Zobel, Rules Practice § 19.3, at 32 (1975). Any claim against the Assurance Fund can only be brought by a "person who. . .sustains loss." General Laws chapter 185 § 101. No party to this proceeding will have sustained a loss until a determination has actually been made here. Indeed, the statute requires that a party exhaust all other remedies before instituting an action against the Assurance Fund. *Id.* Because the statutory scheme set out in c. 185 § 101 contemplates a separate, subsequent action against the Assur-

ance fund, this case may proceed "in equity and good conscience" without the Commonwealth's presence. Rule 19(b). The Commonwealth is thus not indispensable to relief, under Rule 19.

Secondly, the Land Court does not have jurisdiction over a claim against the Assurance Fund. The Land Court has jurisdiction only over "cases and matters cognizable under the general principles of equity jurisprudence where any right, title or interest in land is involved, except actions for specific performance of contracts." Chapter 185 § 1(k). A claim against the Assurance Fund does not fall within this court's equity jurisdiction. In fact, chapter 185 § 101 specifically provides that a person with such a claim "may recover *in contract* in the *Superior Court.*" (emphasis added).

Because the Commonwealth is not an indispensable party under Rule 19(b), this action can proceed without it. And since this court has no jurisdiction over any claim against the Commonwealth, it cannot be joined even if it is a necessary party under Rule 19(a)(2). An action may proceed if there is no jurisdiction over a necessary party, so long as that party is not indispensable. *Franks* v. *Markson*, 337 Mass. 278, 283-284 (1958). I therefore need not reach the question of whether the Commonwealth is a necessary party under Rule 19(a)(2).

Defendant also argues that G.L. c. 231A § 8 mandates joinder of the Commonwealth in this action for declaratory relief. That section provides, in pertinent part, that "[i]n any proceeding which involves the validity of a...privilege granted by the Commonwealth..., the municipality, or the agency granting the privilege...shall be made a party and shall be entitled to be heard." Defendant contends that the Certificate of Title issued by the Land Court is a "privilege" within the meaning of c. 231A § 8.

Once again, I need not reach this issue: regardless of its outcome, joinder of the Commonwealth would be a meaningless exercise because the Land Court has no jurisdiction over the

claim against the Assurance Fund. Since the Commonwealth's absence will not prejudice any current parties or the Commonwealth itself, the case may proceed without it.

ORDER

It is therefore *Ordered* that defendant's motion to join a party be denied.

s/ GEORGE C. KEADY, JR.
GEORGE C. KEADY, JR.
Justice of the Superior Court

DATED: January 10, 1985

EXCERPT FROM APPELLANTS' BRIEF TO SUPREME JUDICIAL COURT

B. *G.L. c. 60, §69A Does Not Bar Plaintiffs' Rights in the Locus as the Assessment, Tax Taking and Tax Foreclosure Action Were Fatally Flawed and Constitutionally Defective.*

1. *Tax taking procedures must be strictly followed.*

The Land Court deprived plaintiffs of their interests in the Locus despite its conclusion that the proceedings upon which the deprivation were based were nullities and of no legal effect as to plaintiffs (I:314, 331).

As the undisputed record required, the Land Court found the original assessment to be invalid pursuant to G.L. c. 59, § 11 (I:314). The record owners were never given notice of the assessment or of the tax lien foreclosure. The notices named only Mr. Veazie, Mr. Easton and their wives (V:1995), who retained record title to only a small portion of the Locus. Assessment must be to the record owner and notice must be directed to him. Without this, interests cannot be affected by tax lien or foreclosure proceedings. This is mandated by state law and constitutional protections of property.

As stated in *Wood* v. *Wilson*, 256 Mass. 340, 342 (1926):

> Brown, to whom the taxes were assessed, was not the owner of the whole of the land assessed, which comprised lots A, C and D. He did own a specific part. *The entire tract could not be assessed to one who owned but a specific portion of it.* Lancy v. Boston, 186 Mass. 128. Because of this assessment to Brown as the owner of the entire tract, the tax sale was invalid.

(Emphasis added). Relying upon *Lancaster* v. *Foley*, 15 Mass. App. Ct. 967 (rescript), *further appellate review denied*, 389 Mass. 1103 (1983), the Land Court erroneously held that the Decree in the Tax Foreclosure Action created a barrier to

plaintiffs' recovery of the Locus, pursuant to G.L. c. 60, § 69A (I:332).

There must be strict compliance with the statute for foreclosure decrees to operate as a bar. *Charland* v. *Trustees of the Home for Aged Women*, 204 Mass. 563, 567 (1910), stated: "The power to sell property for non-payment of taxes is *strictissimi juris*, and a *failure to comply with the statutory requirements, even in minute particulars, is fatal*" (Emphasis added in part). Where statutory requirements in the assessment and the tax taking are not met, those proceedings, and all subsequent proceedings based upon them, are invalid. Where the assessment was to the wrong party and notice was directed only to him, the invalidity is apparent and fatal.

The Land Court itself has so applied *Wood* and *Charland* in a closely analogous situation. In *Land Builders, Ltd.* v. *Brooks*, 2 Mass. Supp. 736 (Land Ct. 1981) (Misc. No. 98749) (copy attached hereto as Attachment E) title to property apparently had been conveyed twice and the title examination in a tax lien foreclosure action had failed to disclose the prior conveyance. Thus, "*no notice* was ever given to the [record owners] of the tax proceedings and they had *no opportunity* to contest the same." *Id.* at 740 (Emphasis added). The rightful owners filed suit some fifty years after the purported tax takings and forty-two years after the tax lien foreclosure decree. The Land Court, following *Wood*, *supra* at 342, *Holcombe* v. *Hopkins*, 314 Mass. 113, 115 (1943), and *Streeter* v. *Worcester*, 336 Mass. 469, 470-471 (1957), held for plaintiffs. 2 Mass. Supp. at 740-741. The Land Court recognized that there must be strict compliance with the law in tax takings, including notice requirements. There is no reason the Land Court should not have applied the principles of *Land Builders* here.

In the light of such cases as *Wood*, *Charland* and *Land Builders*, plaintiffs are entitled to the Locus. The failure of the Town to assess the true owners, the erroneous assessment of

other parties and the total lack of notice of any sort of the tax taking, the assignment to Mr. Gardner of the Tax Foreclosure Action render the taking and the foreclosure decree a nullity. This, in turn, is grounds for revocation of the decree of registration, G.L. c. 185, § 45, and/or the imposition of a constructive trust upon the Locus.

2. *The absence of constitutionally required notice deprived plaintiffs of due process of law.*

Even if the purported taking of plaintiffs' property were not in violation of Massachusetts statutes and controlling judicial decisions, it is plain that the assessment, taking and the Tax Foreclosure Action deprived plaintiffs of property without the due process of law guaranteed by the United States Constitution. Notice was not even purported to be given to plaintiffs; it was to Mr. Veazie, not to them or the record owner. Such notice could not possibly have been "reasonably calculated to reach the persons entitled to it" as the United States Constitution requires. Even if given to the right persons, notice published in the *Nantucket Inquirer and Mirror* in January and February (V:1858) to persons known not to be Nantucket residents (V:1871) does not meet the constitutional requirement of notice by the best means reasonably available.

The jurisprudence makes it plain that the purported notice was constitutionally insufficient. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), states the basic requirements for adequate notice. *Mullane* concerned the pooling of trust funds. The only notice, published in a newspaper, listed the trusts, not the beneficiaries. 339 U.S. at 310. *Mullane* stated that "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." 339 U.S. at 315. For a notice which was "in small type inserted in the back pages of a newspaper. . . [t]he chance of actual notice

is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention." The Court concluded: "In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint." *Id.*

Mennonite Board of Missions v. *Adams*, 462 U.S. 791 (1983), applies *Mullane* to tax takings. *Mennonite* held that a tax taking of land without notice to a mortgagee violated the mortgagee's due process rights by extinguishing the mortgage interest without notice. *Mennonite* mandated that where an interest was identified in a record, "constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. But unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane*." 462 U.S. at 798 (Footnote omitted).

The notice here, by publication to an absentee record holder of a fractional interest and his grantor, both long since dead, resembles that found inadequate in *Mullane*. The notice was a "mere gesture", plainly not designed to inform individuals having current record interests or their heirs. Moreover, the notice given here was conclusively deficient, given *Mennonite's* firm requirement of notice by mail to the last known address or by some other method equally likely to provide actual notice.

Although not employing the language of constitutional due process, this Court previously has recognized that the exercise of "reasonable diligence" to ascertain record owners and to give them notice is a necessary element of tax assessment proceedings in this Commonwealth. In *Hardy* v. *Jaeckle*, 371 Mass. 573, 580 (1976), this Court held that in determining the record owners of certain pasture lands on Nantucket, assessors must "exercise reasonable diligence" to identify the record owners "by resort to the records in the appropriate registry of

deeds and registry of probate". Under "the particular circumstances" presented in *Hardy*, this Court held that no more was required. But even the relaxed standard of *Hardy* was not met here. If it had been met, the Registry would have been searched properly, the record interests of plaintiffs' predecessors in interest located, the lots which they owned assessed to them and notice of any taking given to them.

The requirements of federal due process thus parallel the existing law of the Commonwealth regarding the validity of tax takings. Improper assessments, lack of notice and failure to comply with the provisions of the tax taking statutes *"strictissimi juris"* all render a tax foreclosure invalid and a nullity. The reason for this not only is compliance with the statutory scheme, but also to ensure that there is sufficient protection of the constitutional rights of property owners in any action involving a taking of that property.

The inapplicability of G.L. c. 60, § 69A in circumstances such as this action recently was reconfirmed in *Sharon* v. *Kafka*, 18 Mass. App. Ct. 541 (1984). In *Sharon*, the Appeals Court found that an owner's incapacity was a basis for vacating the decrees only within one year of the entry of the decree, under G.L. c. 60, § 69A, but went on to state:

> There may be, however, circumstances which justify vacating the decrees.... The judge...may in his discretion permit the petitioners to file amended petitions if they can...show that they come...within the rule of other decisions involving the denial of due process of law in analogous circumstances.... *If there was a denial of due process, the stricture of §69A would not apply.*

18 Mass. App. Ct. at 543-44 (Citations omitted, emphasis added). Similarly here, the Land Court found the assessment to be invalid because it was directed to the wrong parties. This finding is the statutory equivalent of a finding of deprivation of due process because of lack of notice.

Mennonite, of course, also raises questions regarding the constitutional validity of the procedures approved in *Hardy* v. *Jaeckle*. In *United States* v. *125.2 Acres of Land*, 732 F.2d 239 (1st Cir. 1984), for example, notice by publication and posting was found inadequate, where more precise notice was possible. The decision noted that an address could be obtained from the telephone book, and concluded: "Due process requires more." 732 F.2d at 242. Under *125.2 Acres*, the town is required to look to all materials reasonably available to attempt to locate the record owners and provide them with actual notice. In contrast, *Hardy* held that a town did not have to look for information regarding the ownership of land outside the appropriate public records. 371 Mass. at 580. In the light of *Mennonite* and *125.2 Acres*, it would appear that the narrow restrictions on source material for locating owners of record set forth in *Hardy* no longer are applicable.

The continued vitality of *Hardy's* restriction of search efforts to public records need not be reached in this case.[4] The Land Court's decision is premised exclusively on the applicability of the bar of G.L. c. 60, § 69A. As *Sharon* v. *Kafka*, *supra*, stated, where there is a denial of constitutional rights, the bar of § 69A cannot operate to deprive a person of his interest in property. *See also*, *Bartevian* v. *Cullen*, 369 Mass. 819 (1976); *Johnson* v. *McMahon*, 344 Mass. 348, 356 (1962); *McHale* v. *Treworgy*, 325 Mass. 381 (1956), which hold that titles taken by invalid takings are not validated by provisions similar to § 69A. Because the notice here did not comply with the constitutional requirement of reasonable effort, even under the relaxed standards of *Hardy* v. *Jaeckle*, it was constitutionally defective and the bar of § 69A does not apply.

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[4] Nor need the Court address the question of the propriety of the Land Court's reliance on, or the continued vitality of, *Guaranty Mortgage Corp.* v. *Burlington*, 385 Mass. 411 (1982). Although the language of *Guaranty Mortgage* seems dubious under *Mennonite* and *125.2 Acres*, that case dealt only with "low value" takings subject to a process not at issue in this case. *See Hilde* v. *Dixon*, 16 Mass. App. 981 (rescript), further appellate review denied, 390 Mass. 1104 (1983).

Decisions of the United States Supreme Court are to the same effect. The inadequacy of the notice provided has the constitutionally necessary effect of voiding all the proceedings in the Land Court relating to the Locus from the time of the initial tax assessment up to the initiation of the present proceeding. It is well-settled that "A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment." *Kremer* v. *Chemical Const. Corp.*, 456 U.S. 461, 482 (1982) (citing *McDonald* v. *Mabee*, 243 U.S. 90 (1917); *Haddock* v. *Haddock*, 201 U.S. 562 (1906)). This principle has been applied even where a claimant may have had actual notice that proceedings were under way, so long as the "reasonable notice" required by the Constitution was not provided. *City of New York* v. *New York, N.H. & H. R. Co.*, 344 U.S. 293, 297 (1953).

This principle was recognized and applied in *125.2 Acres of Land*, *supra*, where notice by publication and posting of an eminent domain proceeding was held inadequate. It was held that the judgment in the 1953 compensation proceeding cut off no rights that the owner or the owner's heirs might have asserted in that proceeding. It should be noted that the decision did not permit the executrix of the estate of the record owner to contest the title of the United States. However, this limitation was based on the peculiarities of the federal eminent domain power. The United States Declaration of Taking Act, 40 U.S.C. § 258a-e, does not require notice in order to vest title in the United States, nor does the Due Process Clause of the Fifth Amendment, which requires only that takings for public purposes not be accomplished without just compensation. Hence, the validity of the taking itself in *125.2 Acres of Land* was not dependent upon reasonable notice to the owners and others having an interest in the property. Proper notice of the 1953 compensation proceeding was required by due process, but the title of the United States was not at issue there.

The limitation on the rights of owners to reclaim property taken by the United States through eminent domain, recognized in *125.2 Acres of Land*, clearly is inapplicable here. As this Court noted recently in *Lynnfield* v. *Owners Unknown*, 397 Mass. 470, 473-474 (1986), the only public or town interest in a tax "taking" is the interest in the recovery of back taxes. Unlike an eminent domain proceeding, there is no public interest in providing an expeditious procedure for the state to acquire title. And, far from immediately vesting title to real estate in the Town, as does the Declaration of Taking Act, Massachusetts tax taking statutes require elaborate proceedings, including termination of rights of redemption, for the adjudication of title to real estate to a town for nonpayment of taxes. It is notice precisely of these proceedings, proceedings which could (and in this case almost certainly would) have resulted in retention of title by the rightful owners, that was lacking here. Because of that failure, all proceedings leading toward adjudication of title to the Locus to the Town were void and plaintiffs are entitled to reclaim the Locus. G.L. c. 60, § 69A may not constitutionally impose a bar to such an action.

The deprivation of plaintiffs' property without due process of law violated the Declaration of Rights, art. 12, of the Massachusetts Constitution. This Court long has recognized that Article 12 contains the same prohibition against deprivations of life, liberty and property without due process of law as the Fourteenth Amendment because "the words 'the law of the land' in art. 12 which were taken from Magna Charta embrace all that is comprehended in the words 'due process of law' in the Fourteenth Amendment." *Pugliese* v. *Commonwealth*, 335 Mass. 471, 475 (1957).

This Court also has recognized that Article 12 "contains safeguards 'at least as strong as those of the Fourteenth Amendment to the United States Constitution.' " *Pugliese* v. *Commonwealth*, *supra*, 335 Mass. at 475, citing *Lowell Gas*

Co. v. *Department of Public Utilities*, 324 Mass. 80, 87, *cert. denied*, 338 U.S. 825 (1949); *Universal Adjustment Corp.* v. *Midland Bank, Ltd.*, 281 Mass. 303, 320 (1933); *Pizer* v. *Hunt*, 253 Mass. 321, 332 (1925). This Court has reaffirmed the principle "that in some situations the State Constitution may afford more protection against deprivation of property without due process than that guaranteed by the Fourteenth Amendment." *McClory* v. *Merkert*, 383 Mass. 883, 884 n.2 (1981) (rescript). This Court also has recognized it "may fashion its own concepts of due process of law under the Constitution of the Commonwealth and apply them within the permissible limits of the Constitution of the United States." *Phillips* v. *Youth Development Program, Inc.*, 390 Mass. 652, 658-659 (1983). *See also*, *Moe* v. *Secretary of Administration and Finance*, 382 Mass. 629, 649 (1981).

In view of the established interpretation of Article 12 as providing at least as much protection to property owners as Amendment XIV of the United States Constitution, the absence of notice to plaintiffs violates the Declaration of Rights, art. 12. This Court clearly must follow the principles of due process recognized by the United States Supreme Court in *Mullane* and *Mennonite* in construing the sufficiency of notice to satisfy Article 12. Accordingly, the Land Court's decision must be reversed because of the failure to provide the notice required by the Declaration of Rights, art. 12.

EXCERPTS OF APPELLANT'S REPLY BRIEF TO SUPREME JUDICIAL COURT

B. *Because of the Fraud and Denial of Due Process G.L. c. 60, §69A Is Inapplicable and the Decree of Registration Was Wrongfully Procured.*

1. *G.L. c. 60, §69A Is Inapplicable.*

The defects in the assessment, tax taking and title examination, and the absence of notice denied plaintiffs due process of law. "If there was a denial of due process, the stricture of § 69A would not apply." *Sharon* v. *Kafka*, 18 Mass. App. Ct. 541, 544 (1984).[4] This principle is so well-settled that defendants do not contest it directly. They concentrate instead on irrelevant statutory provisions and inapposite prior decisions.

Defendants' contention that the defects in assessment tax taking and tax lien foreclosure were neither "substantial" nor "misleading," Bewkes Brief ("B.B.") at 57-61, overlooks the finding of the Land Court to the contrary, and their failure to carry their burden of proof on this issue. *Bartevian* v. *Cullen*, 369 Mass. 819, 822-23 (1976). Reference to other types of assessments and takings are irrelevant because in any such assessment record owners would have been entitled to notice. The cases cited at pages 26-29 of Plaintiff's Brief ("D.B.") mandate strict compliance with the statutory provisions.

Defendant Bewkes cites G.L. c. 60, § 37 in arguing against the rule that errors in tax takings are to be construed "strictissimi juris." (B.B. at 57-58). This is misplaced. As noted by this Court in *Lenox* v. *Olgesby*, 311 Mass. 269, 277 (1942) "[t]his provision has been a part of the tax law since at least 1915." Such a provision was applicable in *Land Builders, Ltd.* v. *Brooks*, 2 Mass. Supp. 736 (Land Ct. 1981) (D.B. Attachment E), which voided a tax taking challenged forty two years after a decree of foreclosure, as well as in *Wood* v. *Wilson*, 256

[4] Had this section not been improperly applied, as the Land Court said, the "decision as to Bewkes and in turn Beinecke might be different."

Mass. 340, 342 (1926) ("a sale of a person's property for non-payment of taxes must be conducted in strict compliance with the law and every requisite of the statute must be complied with.")

The cases cited by defendant Bewkes are inapposite because in each one the Court found notice. Here there was no notice. *Streeter* v. *Worcester*, 336 Mass. 469, 471 (1957), (failure to assess the actual owner renders the tax and the sale void). *Streeter* denied recovery because plaintiff had actual notice. *Gaunt* v. *Arzoomanian*, 313 Mass. 38, 40 (1943), (notice had not been sent to the actual owner, but the effect "was not involved in this case" where the plaintiff succeeded to one who had actual notice). *Springfield* v. *Schaffer*, 12 Mass. App. Ct. 277 (1981), (assessment to the dissolved record owner corporation, so that assessment to him was to the actual owner).[5]

The Land Court found the assessment was invalid under G.L. c. 59, § 11. There was no notice. Based on this finding, the opinion is internally inconsistent. Subsequent proceedings have no foundation at all and constituted a nullity. G.L. c. 60, § 69A is not a bar.

2. *Plaintiffs Have a Property Interest Which Gives Them Standing To Challenge Lack of Due Process in the Underlying Proceedings.*

The plaintiffs here seek to protect property interests that they hold either by deed or succession. Such property interests are within the core of those protected by the due process clause.

Fors v. *Lehrman*, 741 F.2d 1130 (9th Cir. 1984), relied upon by defendants to challenge plaintiffs' standing, in fact demonstrates that they have standing. In *Fors*, non-dependent parents, who had not been qualified as executors or adminis-

[5] The contention that Mass. R. Civ. P. 24(d) is applicable misconstrues plaintiffs' position. Plaintiffs do not contend that there was an unconstitutional statute. They contend that the failure to follow applicable statutes resulted in a denial of due process.

trators of their son's estate, were excluded from challenging a change of status determination in the military (from MIA to KIA) because they had no property interest in the determination at issue. *Fors* nevertheless makes clear, citing earlier cases, that *dependent* parents would have been qualified to challenge the change of status decision because they would have had a property interest. 741 F.2d at 1133-34. That is the analog to this case. Plaintiffs are pursuing their own interests in the Locus which they hold by virtue of their predecessors in title. They may, indeed must, to perfect their own title, pursue all legal issues relevant to the validity of the predecessors' holdings. If defending one's predecessor's title were the pursuit of the rights of third persons and therefore barred by lack of standing, as defendants contend, most property interests would become literally indefensible.

Defendants, similarly, have completely misunderstood the applicability of *Allen* v. *Board of Assessors of Granby*, 387 Mass. 117 (1982). The requirement in *Allen*, that plaintiffs have a property interest at stake as recognized by state law, is noncontroversial. And here there is no question that the interests that plaintiffs hold are property interests for purposes of Massachusetts law.

In *Allen* the supposed "property" interest that was asserted was a claim to discretionary tax abatements. Under the applicable statutes assessors could in their "judgment" grant or deny such abatements for a given year. The court held that this possibility of abatement was a mere expectancy, not a property interest. 387 Mass. at 121.

The rights in real property that are being claimed by the plaintiffs in this case are the rights to title and possession of the property. As the opinion of this court in *Lynnfield* makes clear, no Massachusetts official is given the discretion to grant or deny real property claims depending upon their "subjective judgment."

Defendants' challenge to the standing of executors and administrators during the pendency of the action is similarly misplaced.[6] Defendants never previously objected to these substitutions even at the hearing on the post-trial motions. Supplemental Appendix ("S.A.") 324. They also ignore the provisions of Mass. R. Civ. P. 17 and 25 which permit such executors to be substituted. They ignore that Rule 17(a) permits proper parties to be substituted following this Court's decision. They also overlook that G.L. c. 60, § 76A(a) gives the owner of any portion of a subdivision the right to redeem the entire subdivision on behalf of all the other owners, and the power of this court to fashion an appropriate remedy in its mandate. The constructive trustees will take for the benefit of the rightful owners subject to the usual demands for accounting.

[6] While the defendants claim that constitutional interests are "personal", they cite no authority for the proposition, nor could they, that constitutional rights lapse at the death of the person whose rights were directly violated. Due process claims pursued by or on behalf of successors in title are ubiquitous. For example, one of the leading cases directly applicable to this situation, *United States* v. *125.2 Acres of Land*, 732 F.2d 239 (1st Cir. 1984), is pursued by an executrix for the benefit of heirs. 732 F.2d at 241. Indeed, the first tax taking due process case ever decided by the United States bears the revealing caption, *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 59 U.S. 272 (1855).